86-881

COPY

No. 86-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SAN BERNARDINO,

Respondent,

RICHARD SMOLIN and GERARD SMOLIN,

Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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140 pp

QUESTION PRESENTED

Consistent with Michigan v. Doran (1978) 439 U.S. 282, may an asylum state court block extradition on the ground that the fugitive has not been "charged with a crime" because the court concludes, based on extrinsic evidence, that the fugitive is innocent?

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OPINIONS BELOW

The opinion of the California Supreme Court (reported at 41 Cal.3d 758, 716 P.2d 991) appears in Appendix A. The opinion of the California Court of Appeal, Fourth Appellate District, Second Division, (unreported decision in case

No. E001358) appears in Appendix B. The oral ruling of respondent San Bernardino County Superior Court (contained in a partial transcript of the proceedings of August 24, 1984, in case No. SCV-224030) appears in Appendix C.

JURISDICTION

The decision of the California Supreme Court was filed on May 1, 1986. The People's petition for rehearing was denied on June 5, 1986 (Appendix D). This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2, Clause 2 of the United States Constitution, the Extradition Clause, provides:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from

> which he fled, be delivered up, to be removed to the State having Jurisdiction over the Crime."

Title 18 U.S.C. Section 3182, the Federal Extradition Act, provides:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, district or Territory to which the person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within

thirty days from the time of the arrest, the prisoner may be discharged."

California Penal Code sections 1548.2, 1550.1 and 1553.2, part of the Uniform Criminal Extradition Act, appear in Appendix E.

STATEMENT OF THE CASE

A. Statement of the Facts

On the morning of March 9, 1984, Richard Smolin and his father Gerard (real parties in interest in this case) took Richard's two young children from a bus stop in St. Tammany Parish, Louisiana, and brought them to California. At the time, the children were living in the custody of their mother (Richard's former wife), Judy Pope and step-father in Louisiana.1/

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1. Richard and Judy were divorced in San Bernardino County, California, in 1978, at which time Judy was awarded custody of the children.

Three days later, the prosecutor in St. Tammany Parish charged the Smolins with two counts of parental kidnapping2/ and warrants for their arrest were issued.

On June 14, 1984, Governor Edwards of Louisiana executed requisition demands upon Governor Deukmejian of California for the arrest of the Smolins and their delivery to agents of Louisiana for return to that state. In accordance with the Uniform Criminal Extradition Act (UCEA), the demand was supported by certified copies of the bill of information and arrest warrants, a 1981 Texas court decree giving full faith and credit to

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2. The bill of information charged a violation of La. Rev. Stat. § 14:45, subdivision (4) of which describes the crime as taking a child "from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state."

a 1978 California court order awarding Judy custody of the children, and a sworn affidavit by Judy Pope which stated:

"On March 9, 1984, at approximately 7:20 a.m., Richard Smolin and Gerard Smolin, kidnapped Jennifer Smolin, aged 10, and James C. Smolin, aged 9, from the affiant's custody while said children were at a bus stop in St. Tammany Parish, Louisiana. The affiant has custody of the said children by virtue of a Texas court order dated February 5, 1981, a copy of said order attached hereto and made part hereof. The information regarding the actual kidnapping was told to the affiant by witnesses Mason Galatas and Cheryl Galatas of 2028 Mallard Street, Slidell, Louisiana, and Jimmie Huessler of 2015 Dridle Street, Slidell,

Louisiana. Richard Smolin and Gerard Smolin were without authority to remove children from affiant's custody."3/

On August 17, 1984, the California governor issued extradition warrants against the Smolins.

B. Proceedings in the State Courts

Prior to their arrest on the Governor's warrants, the Smolins sought habeas corpus relief in the Superior Court of San Bernardino County (respondent in this case). The Smolins argued that they were not "substantially charged with a crime" as required under the UCEA because Richard actually had legal custody of the

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3. The extradition papers also contained a Louisiana court order dated March 9, 1984, granting custody of the children to Judy and prohibiting their removal from the jurisdiction (St. Tammany Parish) pending a contested hearing on the custody matter.

children when he took them from the Louisiana bus stop; therefore he could not be guilty of a crime under Louisiana law. A hearing on the Smolins' application was held on August 24, 1984, at which the superior court judge took judicial notice of the "family law file" involving the 1978 dissolution of the marriage of Richard Smolin and Judy Pope.4/ Based on material in that file, specifically a modified order which awarded custody of the children to Richard, the superior court found that Judy Pope's affidavit in support of the extradition demand contained falsehoods and granted habeas corpus relief. In so doing, the court quoted at length directly from the

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4. The habeas corpus proceedings were held before the same judge who presided over the earlier family law matter.

record of the family law case, and then concluded "that the findings in the family law case adequately demonstrate that, in fact, the process initiated by Mrs. Pope in Louisiana and her declarations and affidavits were totally insufficient to establish any basis for rights of either herself personally or for the State, in an [sic] interest of the State of Louisiana". (See Appendix C.)5/

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5. By way of background, evidence before the habeas corpus court below showed that Richard and Judy's California marriage was dissolved in 1978 in San Bernardino County. Judy was awarded custody of the two children at that time. In 1980 Judy remarried and moved to Texas, taking the children with her. In September of that year, Judy commenced proceedings in a Texas court to obtain a full faith and credit decree recognizing the 1978 California custody order. The next month, Richard obtained from respondent superior court a modification of the custody order, the modified order awarding joint custody of the children to Richard and Judy. Judy was served, but did not appear at these proceedings, and was

(Footnote continued)

served with the modified order in November of 1980.

On February 13, 1981, the Texas court issued its full faith and credit judgment recognizing the original (1978) California decree which gave Judy custody. Two weeks later, Richard returned to respondent superior court in California and obtained a second modification of the custody order, this time awarding him sole custody of the children. (It was on the basis of this order that respondent superior court ruled that the Smolins were not substantially charged with a crime in Louisiana.) Over three years later, in March of 1984, the children were abducted; at no time did Richard seek to enforce his California decree in the courts of any other state.

In May of 1984, after the Louisiana kidnapping charges had been filed but before the governor made his extradition demand, both Richard and Judy appeared before respondent superior court in the family law matter. At that time respondent superior court "reaffirmed" its February 27, 1981, order granting sole custody to Richard. Judy appealed the reaffirmation order to the state court of appeal. The appellate court initially reversed the order giving Richard custody for lack of jurisdiction (unreported opinion, filed September 20, 1985, in case No. E001146), then later, upon rehearing,

(Footnote continued)

The People sought review of this order by way of a writ of mandate in the Court of Appeal, Fourth Appellate District.[6/] That court reversed the order of respondent superior court, holding that the lower court improperly took judicial notice of the California decree giving Richard Smolin custody since such extrinsic evidence simply offered an affirmative defense which could only be raised in the Louisiana court. (See Appendix B.)

upheld the lower court's jurisdiction, but reversed for abuse of discretion in confirming the sole custody award to Richard, rather than considering an award of joint custody (unreported opinion, filed February 25, 1986, same case).

6. State law permits such extraordinary relief in extradition matters because it typically produces a much speedier resolution than direct appeal. (See People v. Superior Court (Lopez) (1982) 130 Cal.App.3d 776, 779-780, 182 Cal. Rptr. 132, 134.)

Real parties (the Smolins) sought review of the court of appeal's ruling in the California Supreme Court, which granted hearing in May of 1985. A year later, on May 1, 1986, the state supreme court issued its opinion, reversing the court of appeal and holding that respondent superior court was correct in taking judicial notice of the extrinsic evidence that Richard had been awarded custody by a California court. (See Appendix A.) The state supreme court denied the People's petition for rehearing on June 5, 1986. (See Appendix D.)

* * * * *

REASONS FOR GRANTING THE WRIT

The California Supreme Court has exceeded its jurisdiction and has violated article IV, section 2, clause 2, of the United States Constitution, as well as the implementing laws and interpretive decisions of this Court, by holding that the superior court below properly took judicial notice of evidence extrinsic to the extradition papers in determining whether real parties Richard and Gerard Smolin are "substantially charged with a crime", as required for extradition.7/ The

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7. The superior court blocked the real parties' extradition on the basis that the affidavit of Judy Pope (the complaining witness) falsely declared that real parties "were without authority to remove [the] children from affiant's custody." The superior court reached this conclusion by referring to findings and orders it had made years earlier in the family law case involving the dissolution of Richard and Judy's marriage and the custody of their children. (See Appendix C.)

state supreme court held that it was proper to look outside the extradition documents to a California court order awarding him custody, to decide therefrom that Richard could not be found guilty under Louisiana law, and to therefore conclude the Smolins were not "substantially charged with a crime" in Louisiana. This holding is absolutely contrary to the purpose of the extradition law since it amounts to an acquittal of the fugitive in one state on charges pending in a sister state. The California Supreme Court's opinion will have far-reaching implications, since it interprets a uniform law subscribed to by virtually all the states, as well as previous decisions of this Court. As the

nation's largest state, California receives more extradition requests than any other. This decision could have an effect on a substantial number of those requests; nothing suggests that the holding can be restricted to the narrow facts of this case. The California decision in essence preempts the right of a demanding state to try its own charges by permitting the introduction of extrinsic evidence tending to establish innocence in the asylum state. Certiorari must be granted to prevent this unprecedented decision from becoming the law.

* * * * *

ARGUMENT

RESPONDENT COURT AND THE CALIFORNIA SUPREME COURT HAVE EXCEEDED THEIR JURISDICTION BY CONSIDERING EXTRINSIC EVIDENCE ON THE QUESTION OF WHETHER REAL PARTIES ARE "SUBSTANTIALLY CHARGED" WITH A CRIME

Article IV, section 2, clause 2, of the United States Constitution provides:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

This clause has been implemented by Congress in Title 18, U.S.C. section 3182, and it has been supplemented by the states through the adoption of the Uniform Criminal Extradition Act. In California, the pertinent provisions are Penal Code sections 1548.2, 1550.1 and 1553.2.

Together, these provisions create a mandatory duty upon the asylum state to deliver to a demanding state a person charged with a crime there. Extradition was intended to be a summary executive proceeding in which the judiciary plays an extremely limited role. (Michigan v. Doran (1978) 439 U.S. 282, 288.)

In Michigan v. Doran, this Court defined the limits of the inquiry which an asylum state court is permitted to make:

"[T]he courts of an asylum state are bound by Art. IV, § 3182, and where adopted, by the Uniform Criminal Extradition Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met . . . . Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is

the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." (439 U.S. at pp. 288-289; see also Pacileo v. Walker (1980) 449 U.S. 86, 87.)

Real parties have admitted they are the persons who took the children and whose extradition is sought by Louisiana authorities, and there is no question that the extradition documents on their face are in order. Real parties argued, and the state supreme court held, that they are not "substantially charged"8/ with a

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8. This term derives from earlier decisions of this Court (Munsey v. Clough (1905) 196 U.S. 364, 373; Pearce v. Texas (1894) 155 U.S. 311, 313) and is used in the UCEA (§ 3). (Cal. Pen. Code, § 1548.2.) The adverb "substantially" does not add anything to the constitutional requirement that the person be charged. It simply means that the substance of a criminal charge must be alleged against the person. (See Michigan v. Doran, supra, 439 U.S. at p. 285; People v. Noble (1957) 169 NYS.2d 181, 184; Procter v. Skinner

(Footnote continued)

crime in Louisiana. However, the state court confused the question of whether respondents are substantially charged with a crime with the question of whether they are innocent.

Whether a person is substantially charged with a crime against the laws of the demanding state "is a question of law and is always open upon the face of the papers to judicial inquiry on an application for a discharge under a writ of habeas corpus." (Roberts v. Reilly (1885) 116 U.S. 80, 95, emphasis added.) The courts which have considered this question agree that the inquiry on this issue may not go beyond the face of the

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(Ida. 1982) 659 P.2d 779, 782; People v. Sheriff of Westchester County (NY 1929) 166 NE 795, 796; see generally, Matter of Strauss (1905) 197 U.S. 324, 331.)

extradition documents.9/ No cases have been found which permit the consideration of evidence extrinsic to the documents on the issue of whether the fugitive is substantially charged; certainly the California Supreme Court found none to support its unprecedented holding.

The two cases apparently relied upon most heavily by the state court are not helpful. In People ex rel. Lewis v. Com'r of Correction (1979) 417 NYS.2d 377, it was held that

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9. See, e.g., United States v. Flood (2d Cir. 1967) 374 F2d 554, 556; Moncrief v. Anderson (DC Cir. 1964) 342 F2d 902, 904; Kerr v. Watson (Ore. 1982) 649 P2d 1234, 1238; Fisco v. Clark (Ore. 1966) 414 P.2d 331, 333 Ex parte Paulson (Ore. 1942) 124 P2d 297, 300; Ex parte Harrison (Tex. 1978) 568 SW2d 339, 342; Eroh v. Sheriff (Mich. App. 1978) 272 NW2d 720, 722; Black v. Miller (9th Cir. 1932) 59 F2d 687, 690. Also, for a case very similar to the case at bench, see People ex rel. Leach v. Baldwin (Ill. 1930) 174 NE 51.

an asylum state court may inquire whether the act alleged in the extradition papers constitutes a crime according to the law of the demanding state. That a court may judicially notice the law of the demanding state in determining if the fugitive is substantially charged is not disputed. However, the question is one of law - whether the charge on the face of the papers alleges a violation of the demanding state's law - Lewis in no way sanctioned the admission of extrinsic evidence on this question.

Likewise, in Application of Varona (Wash. 1951) 232 P.2d 923, the charge was theft from a partnership. However, the extradition documents themselves indicated that the accused was a partner in the victimized business. Examination of the statutory

and decisional law of the demanding state (California) revealed that the act charged was not in the abstract a crime under California law at that time, since a partner could not be guilty of theft from his own partnership. Again, contrary to the California Supreme Court's attempt to liken that case to the present one, Varona did not involve consideration of evidence outside the extradition papers themselves. Rather, it was limited to the face of the extradition documents.

In Biddinger v. Commissioner of Police (1917) 245 U.S. 128, this Court addressed the question of what extrinsic evidence is admissible in an extradition habeas corpus proceeding. There it was stated "that when the extradition papers required by the statute are in proper form the only

evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed ...." (245 U.S. at p. 135.) Fugitivity being a question of fact, extrinsic evidence is permitted - not so the question of law whether the fugitive is substantially charged.

This case illustrates very clearly why extrinsic evidence is not permitted on the issue of whether the person is substantially charged. No principle of extradition law is more settled than that the asylum state may not inquire into the guilt or innocence of the accused or consider any affirmative defense to the crime. (UCEA § 20 (Calif. Pen. Code, § 1553.2); Michigan v. Doran, supra,

Biddinger v. Commissioner of Police, supra; Drew v. Thaw (1914) 235 U.S. 432, 439-440; Strassheim v. Daily (1911) 221 U.S. 280, 283, 286.) When an asylum state court admits extrinsic evidence, for example to attack the veracity of the complaining witness as in this case, the court is doing nothing more nor less than permitting the introduction of an affirmative defense which should only be permitted in the demanding state where the charges are pending.10/ This evidence

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10. The superior court below based its order granting habeas corpus relief on a finding that the averments of the complaining witness in her sworn affidavit were false. (This finding by the court was not surprising - it simply reflected the same judge's earlier conclusions in the family law matter.) However, in deciding the question of whether there is a substantial charge, the asylum state court may not inquire into the truth of the allegations. (Pierce v. Creecy (1908) 210 U.S. 387, 403; see also People v. Schneckloth (Colo. 1983) 660

(Footnote continued)

does not establish that the accused has not been charged, it only suggests that he might be innocent. Even if that be the case, it is a question only the demanding state's courts have jurisdiction to determine. (Drew v. Thaw, supra, 235 U.S at p. 439.)

In Drew v. Thaw the fugitive, accused of escape from a mental institution, contended in his habeas corpus challenge to extradition that if he was insane at the time he contrived his escape he could not be guilty, while if he was not insane he was

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P2d 1293, 1295; Stack v. State ex rel. Morgan (Fla. App. 1980) 381 So2d 366.) "An attack on credibility is, in effect, an attack on the demanding state's finding of probable cause. Such an attack is possible only in the courts of the demanding state. [Citations.] Once a court in the asylum state has satisfied itself with the facial validity of the documents, no further inquiry is appropriate on this issue. [Citations.]" (People v. Schneckloth, supra, at p. 1295.)

entitled to be discharged from the institution anyway. He claimed the facts in the record required a finding that he was insane. This Court disposed of the contention, declaring:

> "But this is not Thaw's trial. In extradition proceedings, even when as here a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. . . . When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the Governor of New York allege to be a crime in that State and the reasonable possibility that it might be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculation as to what ought to be the result of a trial in the place where the Constitution provides for its taking place." (235 U.S. at pp. 439-440, emphasis added.)

This principle was echoed a few years later in South Carolina v. Bailey (1933) 289 U.S. 412, where the accused raised the question of fugitivity on habeas corpus in the asylum state: "It was wholly beyond the province of the judge [on habeas corpus] to speculate, as he seems to have done, concerning the probable outcome of any trial which might follow rendition to the demanding State." (289 U.S. at p. 420.)

The underlying reasoning of the California Supreme Court herein is that because real parties should be found not guilty in Louisiana (in light of Richard's California custody order), they are not charged with a crime. This sophistry is in absolute contradiction to the settled principles announced by this Court in Drew v.

Thaw, South Carolina v. Bailey, Roberts v. Reilly and other cases. The state supreme court offers the astounding observation that "the efficiency of the extradition process is enhanced rather than hampered by a resolution of the issue [of the effect of Richard's custody order on the Louisiana charges] by a California court." (People v. Superior Court (Smolin) (1986) 41 Cal.3d 758, 772.)11/ While in many

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11. The California Supreme Court cites Ierardi v. Gunter (1st cir. 1976) 528 F2d 929, 93, at this point. In that case the court held that if the extradition papers did not show that a judicial finding of probable cause had been made in the demanding State, a court in the asylum State must do so as a prerequisite to interstate rendition. (Citing Gerstein v. Pugh (1975) 420 U.S. 103.) Ierardi provides absolutely no support for the California court's decision in the present case. First, Ierardi was decided before Michigan v. Doran. Second, and more importantly, in the present case there was a judicial finding of probable cause made in Louisiana which was not reviewable in California. (Michigan v. Doran, supra, 439 U.S. at p. 290.)

cases it may appear more "efficient" simply to determine a fugitive's guilt or innocence in the asylum state, such a practice not only ignores the mandate of the Constitution and pronouncements of this Court, but affronts the judicial system of the demanding state.

> "The Extradition Clause was intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. [Citations.] The purpose of the Clause was to preclude any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkanize' the adminstration of criminal justice among the several states. It articulated, in mandatory language the concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV....
>
> "The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry

> traditionally intervening between the initial arrest and trial." (Michigan v. Doran, supra, 439 U.S. at pp. 287-288, emphasis added.)

Here, the California courts went beyond a "preliminary inquiry"; they made a determination on the ultimate issue of real parties' guilt or innocence. The state supreme court's futile attempt to disguise this determination as a finding that real parties are not charged is readily transparent. This court pointed out in Pierce v. Creecy, supra, 210 U.S. 387, 401:

> "... [I]t will not do to disclaim the right to attack the indictment as a criminal pleading and then proceed to deny that it constitutes a charge of a crime for reasons that are apt only to destroy its validity as a criminal pleading."

Similarly, the California Supreme Court pays lip service to the

rule that there can be no inquiry into the issue of guilt or innocence in the asylum state, then holds the fugitives are not substantially charged "for reasons that are apt" only to show their innocence. Thus, throughout its opinion the state court engages in the charade of recognizing its lack of authority for doing precisely what it proceeds to do.12/

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12. A perfect example is the court's statement that recognition of the California orders giving Richard Smolin custody of the children "does not violate the principle that an asylum state may not apply its own laws in deciding whether the conduct charged amounted to a crime, because it results only in an acknowledgement of the existence of the orders rather than an assessment of their effect on the charge." (People v. Superior Court (Smolin), supra, 41 Cal.3d at p. 770.) To the contrary, the effect of the orders on Louisiana's charge is precisely the point upon which the court's decision turns - the effect is that if Richard has custody of the children he cannot be found guilty of the charge - therefore, he is not substantially charged. (41 Cal.3d at p.766.)

The state court steps further into the realm of Orwellian "double speak" by proclaiming that its holding is in "complete harmony" with Michigan v. Doran because the custody order "is at least as verifiable as the other matters referred to in the Supreme Court's opinion, such as whether the petitioner is a fugitive from justice." (41 Cal.3d at p. 770.) As Justice Lucas accurately stated in dissent:

> "The majority has put the cart before the horse. What the Supreme Court in Michigan v. Doran held was that there are only four matters that can be considered in habeas corpus extradition proceedings. Although the high court added that these four matters "are historic facts readily verifiable" (438 U.S. at p. 289), it did not hold that a court may consider any other matters (such as asylum state custody rulings or defenses to the crime charged) which

> may also be considered 'historic facts readily verifiable.' The four areas of inquiry described by the court were not illustrative. They were meant to define and restrict the actual boundaries of permissible inquiry. Thus, the trial court clearly exceeded its jurisdiction in considering the California custody ruling because that was not a matter fully under one of Michigan v. Doran's four categories." (41 Cal.3d at p. 775.)

The California holding amounts to a gross misinterpretation of Michigan v. Doran and cannot stand. Allowing consideration of extrinsic evidence on the question of whether the accused is charged inevitably leads a court into the issue of guilt or innocence - an inquiry strictly reserved for the demanding state. There is nothing in the state court's opinion to indicate its rationale would, or could, be limited to the

rather unique facts of this case.13/ If this decision is permitted to stand and become the law of the State of California, its eff ect will obviously be felt by the other states. Indeed, only their interests will be affected. No precedent supports the holding, and it is contrary to the letter and spirit

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13. For example, this case would provide authority for an accused automobile thief, wanted in another state and arrested in California, to claim he is not "substantially charged" because he possesses a "pink slip" or other official certificate of ownership for the vehicle. Certainly such an official document would be as "readily verifiable" as the custody orders in this case. Since the certificate would show the fugitive's ownership, and since he could not be found guilty of stealing his own car, under the California Supreme Court's rationale, he is not "charged." Many other examples could be cited, and each would demonstrate further the fallacy of the state court's reasoning. Simply put, the determination of whether a fugitive is substantially charged must be made on the face of the papers, regardless of the accessibility of extrinsic evidence.

of many pronouncements by this Court regarding the limits of an asylum state court's jurisdiction. The constitutional protection at issue here belongs to the State of Louisiana. It is guaranteed the right to obtain custody of persons against whom its officers have duly filed criminal charges. California has no jurisdiction to decide the fugitives' guilt or innocence and thereby deprive Louisiana of this right. The decision of the California Supreme Court violates the most fundamental principles underlying the law of extradition and must therefore be reversed.

* * * * *

CONCLUSION

For the foregoing reasons, it is respectfully requested that the application for writ of certiorari be granted.

DATED: August 29, 1986

Respectfully submitted,

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SA86US0005
August 29, 1986

A P P E N D I X "A"

SUPREME COURT
FILED
May 1, 1986
LAURENCE P. GILL,
Clerk

Deputy

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Petitioner,	)	L.A. 32068
	)	
v.	)	Super. Ct. No.
	)	SCV 224030
THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,	)	
	)	
Respondent;	)	
	)	
RICHARD SMOLIN et al.,	)	
	)	
Real Parties in Interest.	)	
	)	

Early on a morning in March 1984, Richard Smolin and his father Gerard (for convenience referred to as defendants) took Richard's two young children from a bus stop in St. Tammany's Parish, Louisiana, and

-- SEE DISSENTING OPINION --

brought them to California. Three months later, the Governor of Louisiana requested that defendants be extradited to Louisiana on a charge of kidnapping. The extradition documents forwarded to California did not refer to a custody order made by a California court in February 1981 that had awarded sole custody of the children to Richard. The primary issue in this proceeding for writ of mandate is whether a California court may take judicial notice of its own custody order in determining whether Louisiana's request for extradition must be honored.

In January 1978 a California court granted Richard's petition for dissolution of his marriage to Judith Smolin (now Judith Pope), and awarded custody of the two children of the marriage to Judith, with visitation rights in Richard. Thereafter, Judith remarried; she moved with the children

first to Oregon, then to Texas, and finally to Louisiana.

In October 1980 a California court, on Richard's motion, modified the original custody decree, awarding joint custody of the children to both parents on a finding that Richard had been frustrated in exercising his visitation rights because Judith had removed the children from California without notice. Judith was served in Texas with the order to show cause, as well as a copy of the modification order.

On February 13, 1981, a Texas court issued a "Judgment for Full Faith and Credit" purporting to recognize the 1978 California decree granting custody of the children to Judith. The Texas judgment was thus issued almost four months <u>after</u> California had modified its original decree by granting joint custody to both parents.

A further modification of the California decree was made by a California court in an order filed on February 27, 1981. This time Richard was awarded sole custody, after the court found that Judith had refused to allow any contacts between him and the children. Judith was served with the order to show cause regarding this proposed modification, but when an attempt was made to serve the actual modification order on her, it was at first unsuccessful because she had moved and left no address. She was eventually served with the order in Louisiana in February 1984, the month before the alleged kidnapping occurred.

Defendants took the children on March 9, 1984. Three days later an assistant district attorney in St. Tammany's Parish, Louisiana, filed an information charging defendants with two counts of kidnapping in violation of section 14.45 of the Louisiana

Revised Statutes (hereinafter R.S.A. § 14.45). Subdivision (4) of that statute prohibits the "intentional taking . . . and removing from the state, by any parent, of his or her child, from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state, without the consent of the legal custodian, with intent to defeat the jurisdiction of the said court over the custody of the child." Warrants of arrest were issued the next day by a Louisiana judge, based on the filing of the information.

Seven weeks later, on April 30, 1984, Judith filed an affidavit before a judge in Louisiana, reciting that defendants had kidnapped the children from a bus stop on March 9, 1984, at 7:30 a.m., and naming the witnesses who saw the purported abduction. The affidavit asserted that Judith had

custody of the children by virtue of the February 1981 Texas full faith and credit judgment. It did not mention the prior California decree granting joint custody or the later California order that granted Richard sole custody. The record indicates that, like Judith, the assistant district attorney who filed the information knew of the California orders at the time the information was filed.[1/]

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1. A declaration filed by Gerard Smolin's attorney in support of his petition for habeas corpus, describes a telephone conversation with the Louisiana assistant district attorney. According to the declaration, the Louisiana attorney admitted that he knew at the time of the alleged kidnapping that Richard "was entitled to custody of the minor children . . . by virtue of a California custody decree." However, he believed nevertheless that a crime had been committed because "he viewed the California judgment as being void, having been obtained by fraudulent misrepresentations, and the valid order having been that issued by Texas on February 13, 1981." The Louisiana attorney filed a counter-declaration, but he did not deny that he made these statements.

Judith returned to California to recover custody of the children; she thereby submitted to the jurisdiction of California courts. Following three days of hearings in May 1984, the California court affirmed the February 27, 1981, order granting sole custody to Richard, with reasonable visitation rights in Judith.

The Governor of Louisiana issued a warrant of extradition on June 14, 1984. The request was accompanied by Judith's affidavit, the arrest warrants, the information, and an "Application for Requisition" signed by an assistant district attorney in Louisiana requesting the governor to seek extradition.[2/]

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2. Also included with the extradition documents were a petition filed in Louisiana by Judith on March 9, 1984, following the alleged kidnapping, seeking a restraining order to prevent Richard from removing the children from Louisiana and an order to award (Footnote continued)

In August 1984, defendants filed separate petitions for writs of habeas corpus in the San Bernardino Superior Court, alleging that they were in imminent danger of arrest because the office of Governor Deukmejian had indicated that he was about to issue warrants of extradition. The petitions set forth the facts recited above regarding the California custody decrees, and included some supporting documents. In their points and authorities, defendants urged the trial court to take judicial notice of the

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(Footnote 2 continued)

custody to Judith, as well as an order signed by a judge granting the relief sought. The petition, which was unsigned, alleged that Richard had kidnapped the children, that Judith had custody by virtue of the California dissolution decree granting her such custody, which was recognized by the Texas full faith and credit judgment of February 13, 1981, that the Texas decree had not been abrogated by proper legal process, that Richard had failed to support the children for three years, and that Judith's husband had pending in Louisiana a petition to adopt them.

California custody orders. They asserted that those orders establish that Richard had custody of the children under federal law, the Parental Kidnapping Prevention Act of 1980 (28 U.S.C.A. § 1738A, hereinafter PKPA), and that because custody was with Richard he could not be guilty of kidnapping under Louisiana law. The trial court, which had previously granted a writ of prohibition to prevent enforcement of the Louisiana warrants, issued orders to show cause directed to Governor Deukmejian, the District Attorney of St. Tammany's Parish, and the Sheriff of San Bernardino County, directing them to bring the warrants of extradition before the court to determine the facts and law relating to the threatened imprisonment. The return, which was accompanied by warrants of rendition issued by Governor Deukmejian, contended that extradition was required because the documents submitted by Louisiana

with the request were regular on their face and charged a crime under Louisiana law, and that the trial court had no authority to go beyond the face of the documents to consider the effect of the California decrees or the sufficiency of Judith's affidavit.

Following a hearing during which the court took judicial notice of the California family law file, the court found in favor of defendants. It read into the record statements made by the trial judge during the May 1984 custody proceeding that were critical of Judith's conduct in a number of respects, such as her refusal to allow Richard to have contact with the children.[3/] The court concluded that the State of

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3. The same trial judge presided over the May 1984 proceeding (which affirmed the earlier order granting sole custody to Richard) and the habeas corpus proceeding. The People did not make a motion to disqualify the judge on this ground, although they were invited to do so by the court.

Louisiana had failed to demonstrate that it had any rights with respect to the extradition of defendants.[4/] It therefore granted the writs of habeas corpus and discharged defendants.

The People now seek a writ of mandate to vacate these orders. They primarily contend that the trial court erred in considering the California family law file in support of its determination, and in particular the California orders awarding custody of the children to Richard.

Under the extradition clause of the United States Constitution (art. IV, § 2, cl. 2), a person charged with crime who flees

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4. The judge stated, "The court would conclude that the findings in the family law case adequately demonstrate that, in fact, the process initiated by Mrs. Pope in Louisiana and her declarations and affidavits were totally insufficient to establish any basis for rights of either herself personally or for the State, in an interest of the State of Louisiana."

from justice and is found in another state must, on demand, be delivered to the state having jurisdiction of the crime. The word "demand" in the constitutional provision denotes an "absolute right" to obtain extradition, thereby implying a "correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled." (Kentucky v. Dennison (1861) 65 U.S. 66, 103; State of South Dakota v. Brown (1978) 20 Cal.3d 765, 768-769.) Interstate extradition is intended to be a summary proceeding designed to bring offenders to trial as swiftly as possible in the state where the offense was committed. (Michigan v. Doran (1978) 439 U.S. 282, 287-288.) Therefore, a court in the asylum state, considering an application for a writ of habeas corpus to resist extradition, is limited in the scope of its inquiry: it may

not inquire into the credibility of the affiant on whose declaration the charge is based (Jacobsen v. State (Idaho 1978) 577 P.2d 24, 28) or into the guilt or innocence of the person sought by the demanding state (In re Kimler (1951) 37 Cal.2d 568, 571; In re Murdock (1936) 5 Cal.2d 644, 648, Pen. Code, § 1553.2).

Michigan v. Doran, holds that once the governor of the asylum state has granted extradition, a court considering release on habeas corpus can do no more than decide "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." The high court added that

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these "are historic facts readily verifiable." (439 U.S. at p. 289.)[5/]

Many states, including Louisiana (La. Code Crim. Proc., art. 261 et seq.) and California (Pen. Code, § 1548 et seq.) have adopted the Uniform Criminal Extradition Act to facilitate their duty to extradite persons charged with crime by another state. Under the uniform act as adopted in California, a demand for extradition of a person charged with crime must he recognized if it alleges that the accused was present in the demanding

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5. In Michigan v. Doran, the Supreme Court considered a request by Arizona to Michigan to extradite a person accused of crime committed in Arizona. The Michigan court found the Arizona request deficient because, in its view, the supporting documents did not demonstrate probable cause for charging the petitioner with a crime, despite a statement by the Arizona judge that such a finding had been made. The high court reversed, holding that when a neutral judicial officer of a demanding state has made a finding of probable cause, no further judicial inquiry may be had on that issue in the asylum state.

state at the time the crime was committed and fled therefrom. The demand must be accompanied by an indictment, information, or an affidavit made before a magistrate in the demanding state (with a copy of a warrant issued thereon), which substantially charges a crime under the law of the demanding state. (Pen. Code, § 1548.2.)[6/]

Defendants admit that they are the persons whose extradition is sought by Louisiana, and that they left that state with the children. They claim, however, that Louisiana has not substantially charged them

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6. The uniform act as adopted in California and other jurisdictions requires that the papers must "substantially charge" a crime under the law of the demanding state. Michigan v. Doran, in setting forth the requirements for extradition, omits the word "substantially." The opinion in that case explains that the term derives from earlier decisions of the United States Supreme Court. (439 U.S. at p. 285, fn. 4.) We shall refer to this requirement in the manner set forth in the uniform act and our own statute.

with a crime, and they were therefore entitled to be discharged. They reason as follows: Under the Louisiana statute relied on by the People, a parent may not be charged with kidnapping a child if he is entitled to custody, and the California decree demonstrates that Richard was entitled to custody of the children at the time of the alleged kidnapping. In deciding whether defendants had been substantially charged with a crime, the trial court was authorized to take judicial notice of the California decree and to recognize its binding effect under the PKPA.

As a preliminary matter, we note that the basis of the trial court's ruling in favor of defendants is not altogether clear. (See fn. 4, ante.) We agree with defendants, however, that the court's remarks at the conclusion of the hearing may be fairly construed as a finding that Louisiana had not

substantially charged them with a crime, and we proceed with our discussion on that assumption.

We concur also in defendants' assertion that under Louisiana law a parent entitled to the custody of a child cannot be found guilty of kidnapping. The language of subdivision (4) of R.S.A. § 14.45 defines the crime as taking a child "from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state." Thus, in order to charge a crime under the statute the person deprived of custody must have been awarded custody by such a court. And it has been held in Louisiana that a father who shares equal custody rights with the mother cannot be found guilty of kidnapping under this statute when he takes a child without the permission of the mother. (State v. Elliott (La. 1930) 131 So. 28, 30.)

There is a problem at the threshold of our analysis. The courts of this state may not inquire into the guilt or innocence of the person whose extradition is sought (Pen. Code, § 1553.2), but may deny extradition if the demanding state has not substantially charged that person with a crime (id., § 1548.2). We must first decide, therefore, whether defendants' challenge to the sufficiency of the extradition request amounts to a claim that they are innocent of kidnapping, or whether their assertion may properly be characterized as a claim that Louisiana has not substantially charged them with a crime.[7/]

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7. For the purpose of considering this preliminary question we shall assume that the trial court here acted correctly in taking judicial notice of the California custody ruling.

The difference between these issues is somewhat elusive, because they may be interrelated.[8/] We think, however, that when as here the extraditee admits that he has performed the acts with which he is charged but claims, for reasons independent of his own conduct or state of mind, that those acts do not amount to the commission of a crime under the laws of the demanding state, the gravamen of his assertion is that no crime was charged against him. (See People ex rel. Lewis v. Com'r. of Correction (1979) 417 N.Y.S.2d 377, 380-382.) To illustrate: if the Louisiana extradition papers had been accompanied by a custody decree which showed

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8. It would ordinarily follow from the fact that a crime was not substantially charged that the person against whom the attempted charge was made was not guilty of its commission. But the converse, of course, is not true: from the fact that a person may be found not guilty of a crime it does not follow that the crime itself was not substantially charged.

that custody was in Richard, it seems clear that defendants could properly claim they had not been substantially charged with a crime under Louisiana law.

A charge of crime is deemed not to be substantial if, for example, the statute under which the demanding state makes the charge has been declared unconstitutional by the highest court of that state or the United States Supreme Court (In re Cooper (1980) 53 Cal.2d 772, 779-780), the statement of the charge does not fall within the demanding state's statutory definition of the crime (In re Katcher (1952) 39 Cal.2d 30, 31-32), or the acts charged do not constitute a crime under the law of the demanding state (Application of Varona (Wash. 1951) 232 P.2d 923, 924, People ex rel. Lewis v. Com'r. of Correction, 417 N.Y.S.2d 377, 380-382). In Varona, California sought extradition of a person it charged with feloniously taking

money from a partnership of which he was a member. Extradition was denied for failure to substantially charge a crime because under California law a partner could not be held guilty of misappropriating partnership funds. So here, defendants assert they are not substantially charged with violating Louisiana's kidnapping statute because it provides that the person from whose custody a child is taken must have been awarded custody by a court of competent jurisdiction, and it is Richard rather than Judith who was entitled to custody at the time of the alleged kidnapping.[9/]

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9. We recognize that some cases hold that the asylum state must leave the determination of whether the laws of the demanding state render the extraditee's conduct a crime to the laws of that state. (E.g., Hopper v. State ex rel. Schiff (N.M. 1984) 678 P.2d 699, 701.) Here, however, the Louisiana statute on its face provides that this type of kidnapping may be committed only by a parent who lacks custody. The (Footnote continued)

Thus far we have concluded that, assuming the California decree was properly considered by the trial court, defendants' assertion based thereon raised the issue whether Louisiana had substantially charged them with the crime of kidnapping.

A more difficult question is whether the trial court had the power to consider the

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(Footnote 9 continued)
extradition papers implicitly recognize that custody in Judith is a necessary predicate to the charge: the Governor's extradition request and Judith's affidavit both rely on the Texas full faith and credit judgment as granting her custody. In these circumstances defendants are claiming that the charge is void on its face (cf. In re Cooper, supra, 53 Cal.2d 772, 779-780) and "lacking altogether in a reasonable basis" (In re Katcher, supra, 39 Cal.2d 30, 31). In a case decided after Michigan v. Doran, it was held that the courts of New York, the asylum state, had the power to inquire whether the act alleged against the extraditee constituted a crime under the laws of the demanding state to the extent that he claimed that the statutory or decisional law of that state did not establish the act as criminal, or that to make the act criminal would violate the United States Constitution. (People ex rel. Lewis v. Com'r. of Correction, supra, 417 N.Y.S.2d 377, 379-380.)

California sole custody decree to support its determination that Louisiana had failed to substantially charge defendants with a crime.[10/] Under the Evidence Code, a court must take judicial notice of the records of any court of this state, upon proper notice to the court and the adverse party. (Evid. Code, §§ 452, subd. (d)(1), 453.) The People claim that this requirement cannot be applied in an extradition proceeding. Relying on the rule that only relevant evidence is admissible by judicial notice (Mozzetti v. City of Brisbane (1977) 67 Cal.App.3d 565, 578), they assert that the California order is not relevant to the only issue before the court, which they

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10. We need not decide whether the court properly took judicial notice of the entire family law file, including statements of the trial judge which were critical of Judith's conduct. It is sufficient for our purposes to limit consideration to the custody orders made by the California court.

characterize as whether the documents submitted by Louisiana support its extradition demand, in the light of Louisiana law.

While the foregoing contention is ingenious, its force depends on the resolution of the main issue involved in this proceeding in favor of the People, namely, their claim that in determining whether a crime is charged the courts of an asylum state may not go beyond the face of the extradition documents (and the law of the demanding state) by taking judicial notice of their own orders.

The People cite no convincing authority for this proposition. Michigan v. Doran holds that the asylum state in a habeas corpus proceeding must decide "whether the petitioner has been charged with a crime in the demanding state" (439 U.S. at p. 289), but it does not give any guidance as to the

matters which may be considered in making that determination. Other cases contain language in support of the People's position, but none of them involves the question we are confronted with here. United States v. Flood (2d Cir. 1967) 374 F.2d 554, 556, upon which the People primarily rely, did not relate to a claim that the extradition papers failed to charge the petitioner with a crime. Rather, the issue there was the sufficiency of the affidavit attached to the extradition warrant because it was based on hearsay evidence, and the court concluded that the persuasiveness of the affidavit was not a subject on which the courts of the asylum state could pass judgment.11/ Moncrief v. Anderson (D.C.Cir.

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11. The decision, in assessing the claim of hearsay, concludes: "But, in considering the sufficiency of the extradition warrant and the papers accompanying it . . . it is not for the asylum state on habeas corpus to pass upon the quality, persuasiveness or (Footnote continued)

1964) 342 P.2d 902, states in dictum in a footnote only that the question whether a valid charge has been made "can" be determined from the extradition papers (fn. 3 at p. 904), not that it must be. Roberts v. Reilly (1885) 116 U.S. 80, 95-96, also contains broad language which leans toward the position of the People, but again the court's holding does not appear to relate to the problem at hand.12/ Finally, in In re

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(Footnote 11 continued)

weight of the evidential matter on the basis of which the Governor of Florida issued the extraordinary warrant, for it is solely a question of law whether on the face of the papers accompanying the warrant there was sufficient to say that a crime was' substantially charged . . . under the laws of Florida and that he was alleged to be a fugitive." (374 F.2d at p. 556.)

12. The opinion states that the question whether a person is substantially charged with a crime is a question of law which "is always, open upon the face of the papers to judicial inquiry." (116 U.S. at p. 95.) Later, the court rejects the petitioner's
(Footnote continued)

Harper (1936) 17 Cal.App.2d 446, 448, the court, relying on the language of Roberts v. Reilly held that it was "apparent" from the requisition and statute of the demanding state that a crime had been charged.13/

(Footnote 12 continued)
claim that the indictment did not substantially charge larceny because it did not state that the corporation from whose possession the property was taken was capable of ownership under the law of the demanding state. This issue, states the court, "is not matter of law arising upon the face of the indictment, but can arise only at the trial upon the evidence, if the question should then be made. The averment in the indictment is the allegation of a fact which does not seem to be impossible in law, and is, therefore, traversable." (Id. at p. 96.) This language is not altogether clear, but we read the court's holding to mean that the courts of an asylum state are foreclosed from inquiring whether the law of the demanding state renders the actions alleged in the indictment a crime. The People concede that this is not the law as it stands today. Indeed, they insist that such an inquiry is necessary to provide a legal frame of reference for deciding whether a crime has been charged.

13. The petitioner in Harper attempted to raise matters outside the scope of the
(Footnote continued)

We perceive no valid reason for fashioning an exception to the requirements of the Evidence Code by creating a rule that a court may not take judicial notice of its own orders in considering a habeas corpus petition in an extradition proceeding. Recognition of such orders does not violate the principle that an asylum state may not apply its own laws in deciding whether the conduct charged amounted to a crime, because it results only in an acknowledgement of the existence of the orders rather than an assessment of their effect on the charge. Moreover, such a ruling is in complete harmony with the statement in Michigan v.

(Footnote 13 continued)
requisition papers in support of his claim that a charge had not been made against him. The court rejected this attempt on the ground that the matters which petitioner raised went to the question of guilt or innocence, an issue which the court was foreclosed from investigating.

Doran which describes the matters that the courts of an asylum state may consider in habeas corpus extradition proceedings as "historic facts readily verifiable." (439 U.S. at p. 289.) Certainly, the fact that a court has made a particular order is at least as verifiable as the other matters referred to in the Supreme Court's opinion, such as whether the petitioner is a fugitive from justice. Lastly, as we shall see, judicial notice in this context does not infringe on the governmental interests at stake in an extradition proceeding.

We conclude that the trial court acted properly when it took cognizance of the California sole custody order in making its determination that the extradition papers did not charge a crime. So far as we are aware, the validity of that order had never been challenged by either Judith or Louisiana at the time the alleged kidnapping occurred. If

such a challenge may be implied from Louisiana's reliance on the intervening Texas judgment, purportedly based on full faith and credit, we do not hesitate to support defendants' claim that the California decree prevails.

There is no jurisdictional obstacle to our consideration of this issue. The question is one of federal law, as expressed in the PKPA, which preempts state law on the issue of jurisdiction by a state to render a valid custody decree. (State ex rel. Valles v. Brown (N.M. 1981) 639 P.2d 1181, 1184.) The courts of California are not precluded from assessing the effect of that law on the controversy. In In re Cooper, supra, 53 Cal.2d 772, 779-782, we analyzed the effect of decisions of the United States Supreme Court in determining whether the Pennsylvania statute under which the petitioners were charged was void on its face. (Accord,

People ex rel. Lewis v. Com'r. of Correction, supra, 417 N.Y.S.2d 377, 381.)

The PKPA provides that "every State shall enforce according to its terms, and shall not modify . . . any child custody determination made consistently with the provisions of this section by a court of another State." (28 U.S.C.A. § 1738A(a).) A state has jurisdiction to make a custody order if such jurisdiction exists under its own laws and it is the home state of the child at the time the order is made. (Id., subds. (c)(1), (c)(2)(A).) The term "home state" is defined as the one in which, "immediately preceding the time involved, the child lived with his parents . . . for at least six consecutive months . . . ." (Id., subd. (b)(4).) Modification of a custody order valid under this standard may be made only by the court which originally rendered

the decree, except in circumstances not relevant here.[14]/

The original decree issued by California in 1978 granting custody of the children to Judith must be conceded by the People to have been valid when it was made, since Judith's claim to custody, a necessary predicate to the kidnapping charge under Louisiana law, has its origin in that decree. On the face of the record, therefore, only California had jurisdiction to modify that decree.

The Texas judgment, filed on February 13, 1981, which purported to give effect to the 1978 custody order rendered in California, was preceded by almost four

14. For example, a state which is not the home state of the child may modify a custody decree if neither the child nor a contestant lives in the home state at the time the modification is sought, or if the home state no longer has jurisdiction (id., subd. (d)) or has declined to exercise jurisdiction (id., subd. (f)).

months by the California order of October 20, 1980, modifying the original judgment to grant joint custody of the children to both parents. More important, on February 27, 1981, a court of this state--the only court with jurisdiction to modify the decree--granted sole custody to Richard. Thus, when Louisiana filed the information on March 12, 1984, charging petitioners with kidnapping on the premise that the Texas judgment was the act of a "court of competent jurisdiction" which had granted custody of the children to Judith (R.S.A. § 14:45), that decree had long been superseded by the February 27, 1981, California sole custody order.[15]/

15. The decree of a Louisiana court issued on March 9, 1984, following the alleged kidnapping (see fn. 2, ante), may not be deemed an order binding on California. The PKPA grants a court jurisdiction to make an emergency custody order if a child is (Footnote continued)

We are mindful of the duty of our courts to faithfully and vigorously enforce the constitutional provision requiring extradition, and we recognize that our obligation in this regard should not be "so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum" in California. (Appleyard v. Massachusetts (1906) 203 U.S. 222, 228.) But we cannot ignore the fact that extradition represents a "significant

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(Footnote 15 continued)
physically present in the state at the time of the order and it is necessary to protect the child because he has been subjected to or threatened with mistreatment or abuse. (28 U.S.C.A. § 1738A(c)(2)(C).) Even if this provision could be applied to the March 9 order, there is no indication that the children were present in Louisiana when the order was issued or that defendants were served with the order prior to leaving the state with the children. Moreover, the Louisiana Governor's warrant was based not on defendants' violation of the order of the Louisiana court, but on existence of the Texas full faith and credit judgment.

pretrial restraint of liberty." (Ierardi v. Gunter (1st Cir. 1976) 528 F.2d 929, 930.) The important governmental interests at stake in the prompt execution of extradition requests are comity between the states and efficiency in bringing fugitives to justice. (Ibid.) These interests are not jeopardized by our holding. Since Louisiana would be compelled under the terms of the PKPA to take judicial notice of the California order, there is no justification for withholding recognition by a California court.[16/] Furthermore, the effect of the order must be decided under federal law rather than Louisiana law. This is a determination which the courts of California are empowered to

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16. The PKPA contemplates that the courts of each state will take judicial notice of the custody orders issued in other jurisdictions because a determination whether a foreign decree is consistent with the federal law may be made only if the existence of the foreign decree is acknowledged.

make. Thus, the efficiency of the extradition process is enhanced rather than hampered by a resolution of the issue by a California court. (Cf. Ierardi at p.931.)[17]/

Under all the circumstances, we conclude that the trial court did not err in deciding that defendants had not been substantially charged with a crime by Louisiana. While we feel compelled to express our disapproval of the self-help manner in which defendants chose to enforce Richard's right to custody, we hold nevertheless that defendants were entitled to be discharged.[18]/

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17. In Ierardi the court decided that the efficiency of the extradition process was not significantly diminished by its holding that if the courts of the demanding state failed to determine whether there was probable cause to charge the petitioner the courts of the asylum state may do so.

18. Defendants' motion of October 3, 1985, to augment the record on appeal, is denied.

The alternative writ is discharged, and the petition for writ of mandate is denied.

MOSK, J.

WE CONCUR: BIRD, C.J.
BROUSSARD, J.
REYNOSO, J.
GRODIN, J.
* TODD, J.

* Honorable Kathryn Doi Todd, Los Angeles Superior Court, assigned by the Chairman of the Judicial Council.

PEOPLE v. SUPERIOR COURT OF
SAN BERNARDINO COUNTY (SMOLIN)
L.A. 32068

DISSENTING OPINION BY LUCAS, J.

I respectfully dissent to the majority's holding that "defendants [have] not been substantially charged with a crime in Louisiana." My colleagues have ignored the limitations on an asylum state's powers of judicial examination in extradition proceedings established by the United States Supreme Court in Michigan v. Doran (1978) 439 U.S. 282.

In Michigan v. Doran, the high court held that only four matters may be considered by a court in the asylum state reviewing a request for release on habeas corpus. Those matters are derived from the extradition

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clause[1] of the United States Constitution (art. IV, § 2, cl. 2) and from 18 United States Code section 3182[2] implementing the

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1. "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

2. "Whenever the executive authority of any State or Territory demands any person as a fugitive from Justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

extradition clause. The court explained that "[w]hatever the scope of discretion vested in the governor of an asylum state . . . , the courts of an asylum state are bound by Art. IV, § 2, cf. Compton v. Alabama, 214 U.S. 1, 8 (1909), by § 3182, and, where adopted, by the Uniform Criminal Extradition Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. . . . Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition, and (d) whether the petitioner is a fugitive." (439 U.S. at pp. 288-289.)

Because defendants admit that they are the persons who took the children and whose extradition is sought by Louisiana, the only remaining questions are "whether the extradition documents on their face are in order" and "whether the petitioner has been charged with a crime in the demanding state." The extradition documents on their face are in order, and defendants therefore confine their argument to a claim that they are not substantively charged with a crime.

The majority correctly notes that although California courts cannot inquire into the guilt or innocence of a person whose extradition is sought (Pen. Code, § 1553.2), nonetheless extradition documents must "substantially charge the person demanded with having committed a crime" under the laws of the demanding state. (Id., § 1548.2.) (Ante, p. ___ [maj. opn. at p. 11].) My colleagues, however, confuse the question of

whether defendants are substantially charged with a crime with the question of whether defendants are innocent. Whether a person is substantially charged with a crime against the laws of the demanding state "is a question of law and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus." (Roberts v. Reilly (1885) 116 U.S. 80, 95, italics added.) "Any other judicial inquiry in the asylum state into the matter exceeds the court's jurisdiction. [Citations.]" (In re Fabricant (1981) 118 Cal.App.3d 115, 120.) By going beyond the "face of the papers," my colleagues probe too far.

The majority notes that People ex rel. Lewis v. Com'r. of Correction (1979) 417 N.Y.S.2d 377, 379-380, held that the asylum state may inquire whether the act alleged in the extradition papers constitutes

a crime according to the statutory and decisional law of the demanding state. (Ante, P. ___ [maj. opn. at fn. 9].) This inquiry is necessary in order to discover whether the extradition papers substantially charge the person demanded with having committed a crime under the laws of the demanding state. (See Pen. Code, § 1548.2.) For example, in Application of Varona (Wash. 1951) 232 P.2d 923, a case cited by the majority, the extradition documents indicated that defendant was a partner charged with stealing money from his own partnership. (Ante, p. ___ [maj. opn. at p. 13].) Examination of the statutory and decisional law of the demanding state (California) revealed that the act charged was not in the abstract a crime under California law at that

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time.[3/] When defendants in the instant case argued that the extradition documents did not substantially charge them with the crime of kidnapping because they had authority to take the child, they asked the court to look beyond the extradition documents and the statutory and decisional law of both Louisiana and California to determine the status of the alleged crime in general. Instead, they requested that the court take cognizance of a particular document to determine whether they, individually, were "charged with a crime." That requested consideration clearly involved contemplation of an individual defense to an otherwise permissible charge, something the court has no power to examine in extradition

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3. A later California case, People v. Sobiek (1973) 30 Cal.App.3d 458, held that a partner may be guilty of embezzling or stealing partnership property.

proceedings. In sum, defendants are arguing their innocence, not challenging the sufficiency of the extradition request. The California custody order that they offer thus supports an affirmative defense which may be considered only by the Louisiana court, not the California court.

My colleagues conclude that their holding here is in "complete harmony" with Michigan v. Doran, supra, because a custody ruling is "at least as verifiable as the other matters referred to in the Supreme Court's opinion. . . ." (Ante, p. ____ [maj. opn. at p. 18].) The majority has put the cart before the horse. What the Supreme Court in Michigan v. Doran held was that there are only four matters that can be considered in habeas corpus extradition proceedings. Although the high court added that these four matters "are historic facts readily verifiable" (438 U.S. at p. 289), it

did not hold that a court may consider any other matters (such as asylum state custody rulings or defenses to the crime charged) which may also be considered "historic facts readily verifiable." The four areas of inquiry described by the court were not merely illustrative. They were meant to define and restrict the actual boundaries of permissible inquiry. Thus, the trial court clearly exceeded its jurisdiction in considering the California custody ruling because that was not a matter fully under one of Michigan v. Doran's four categories.

Interstate extradition is meant to be a summary executive proceeding; the extradition clause "never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial." (Michigan v. Doran, supra, 439 U.S. at p. 288.) Under the constitutional provision,

extradition is not a matter of mere comity, but instead is an absolute right of the demanding state and a duty of the asylum state. (In re Russell (1974) 12 Cal.3d 229, 234.) "[A]n asylum state does not refrain from undertaking an examination of a fugitive's guilt merely to avoid procedural delays or complications in the rendition procedure. Rather it does so in recognition of the principle that such an inquiry 'into the merits of the charge against the prisoner or into the motives which inspired the prosecution in the demanding State . . . exceeds its authority under the constitutional and statutory provisions regulating the extradition of criminals. The mandate of the Constitution requires 'a person charged in any State with a crime' to be delivered by the asylum State to the State whose laws he has violated. That State alone can determine the guilt or innocence of the

offending party.' (In re Kimler (1951) 37 Cal.2d 568, 572.)" (In re Golden (1977) 65 Cal.App.3d 789, 796.) The majority and trial court here have completely ignored the constitutional and statutory limitations on an asylum state's role in requests for extradition.

As noted, Richard's claim of entitlement to sole custody of his children based on a 1981 California custody order[4/] is

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4. On April 11, 1984, in California, Judith initiated an order to show cause to set aside the custody order of February 11, 1981, which awarded sole custody to Richard. The trial court reaffirmed the 1981 order on May 31, 1984. Judith appealed, and the Court of Appeal on rehearing on February 25, 1986, reversed the 1984 order and remanded the matter for further proceedings. Although there now exists a question about the current validity of Richard's 1981 custody order, the order apparently was valid on March 9, 1984, when Richard took his children from Louisiana. In my opinion, the custody order and its questioned validity are not in any event relevant to the resolution of this extradition case, however, because the custody order is not a matter that can be considered in habeas corpus extradition proceedings pursuant to Michigan v. Doran.

an affirmative defense to the kidnapping charge, which must be asserted in a Louisiana court. The asylum state, California, was without jurisdiction to inquire into the guilt or innocence of the person whose extradition was sought; that decision may be reached only by the demanding state. (Pen. Code, § 1553.2, In re Russell, supra, 12 Cal.3d at pp. 778-779.) For the foregoing reasons I would hold that the trial court erred in taking judicial notice of the California custody order, and I would grant the petition for writ of mandate.

LUCAS, J.

A P P E N D I X "B"

SAN BERNARDINO
District Attorney
1985 MAR 27 PM 1:50

FILED
Keeman G. Cassady, Clerk
March 26, 1985
COURT OF APPEAL
FOURTH DISTRICT

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN BERNARDINO, Respondent; RICHARD SMOLIN, et al., Real Parties in Interest.	)	E001358 Sup. Ct. No. SCV 224030 O P I N I O N

ORIGINAL PROCEEDING; petition for a writ of mandate. Granted.

(See concurring opinion.

Dennis Kottmeier, District Attorney and Joseph A. Burns, Deputy District Attorney for Petitioner.

Albert H. Maldonado for Real Party in Interest Richard Smolin.

Chuck Nacsin for Real Party in Interest Gerard Smolin. No appearance for Respondent.

The issue presented by these original proceedings is whether a California superior court may grant habeas corpus relief to a person against whom an extradition warrant has been issued by the California Governor, when the ground urged for issuance of the writ is that an affidavit supporting the extradition requests, although valid on its face, is factually inaccurate because of the affiant's alleged omission to include certain pertinent facts.

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STATEMENT OF FACTS

Judy and Richard Smolin were married at one time and have two children. Their 1978 marriage was dissolved in respondent superior court. The court awarded custody of the children to Judy, with a right of reasonable visitation accorded Richard.

In 1980, Judy remarried and moved to Texas, taking the children with her. She then instituted proceedings in Texas to obtain a full faith and credit judgment recognizing her custody over the children.

Meanwhile, Richard successfully moved the California court for an order giving him joint custody of the children. In a later proceeding he obtained an order giving him sole custody of the children. Judy was personally served with both of these orders.

Soon thereafter Judy obtained a decree in Texas giving full faith and credit

to the original unmodified California custody order.

Judy and her children then moved to Louisiana, and she began proceedings in that jurisdiction to have the Texas decree recognized. A proceeding was also commenced looking to accomplish adoption of the children by Judy's new husband.

On March 9, 1984, armed with the latest California custody order, Richard and his father, Gerard, "picked up" the children at a school bus stop in Louisiana and brought them back to California. On March 12, 1984, at Judy's instance the Louisiana district attorney filed a bill of information against Richard and Gerard accusing them of kidnapping the two children. Warrants were issued for their arrest pursuant to the charges.

Several days later, Richard and Gerard obtained a writ of prohibition from a

California superior court which prohibited all law officers in this state from enforcing the warrants.

In May 1984, a hearing was held in respondent superior court on the issue of custody of the children. This hearing was attended by both Judy and Richard, and the children were in California at the time. The court issued an order giving sole custody of the children to Richard, with the right of reasonable visitation accorded Judy.

On June 14, 1984, Governor Edwards of Louisiana executed requisition demands upon Governor Deukmejian for the arrest of Richard and Gerard and their delivery to agents of the state of Louisiana for return to that state. The demand was supported by an affidavit signed by Judy which stated:

"On March 9, 1984, at approximately 7:20 a.m., Richard Smolin and Gerard Smolin, kidnapped Jennifer Smolin, aged 10, and James

C. Smolin, aged 9, from the affiant's custody while said children were at a bus stop in St. Tammany Parish, Louisiana.

The affiant has custody of the said children by virtue of a Texas court order dated February 5, 1981, a copy of said order attached hereto and made part hereof. The information regarding the actual kidnapping was told to the affiant by witnesses Mason Galatas and Cheryl Galatas of 2028 Mallard Street, Slidell, Louisiana, and Jimmy Huessler of 2015 Dridle Street, Slidell, Louisiana. Richard Smolin and Gerard Smolin were without authority to remove children from affiant's custody."

On August 6, 1984, Governor Deukmejian's extradition secretary confirmed that the warrants would issue against Gerard and Richard on August 13, but would be held until August 23.

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Before that date, Gerard and Richard filed applications for habeas corpus relief with the respondent superior court. At the hearing of this application, held on August 24, 1984, the court found that Judy's affidavit contained misstatements regarding who had custody over the children because it did not refer to the California custody order, with the result that the extradition demand was legally insufficient. The court then granted both Gerard and Richard's application for habeas corpus relief.

Contending that this order constituted an abuse of the respondent court's discretion and exceeded the bounds of its jurisdiction, the People have petitioned this court for a writ of mandate directing the respondent court to vacate its order.

DISCUSSION

The People contend that the respondent court has exceeded its authority

in granting the habeas corpus relief to real parties, because the court went beyond the face of the extradition documents and made a determination as to the innocence of real parties. Conversely, real parties argue that the court was authorized to make such an inquiry. Although they couch their arguments in several ways, real parties' basic position is, in considering whether a person is substantially charged with a crime in the demanding state, that a court may inquire into the sufficiency of the affidavit accompanying the warrant, that in this case the affidavit is insufficient, and that therefore, the court properly granted the petition for a writ of habeas corpus.

Article IV, section 2, clause 2 of the United States Constitution provides: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall

on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." This constitutional provision extends to the demanding state a right and to the asylum state a corresponding duty to deliver the requested fugitive.

"Extradition is not a matter of mere comity between the states. . . . The role of the judiciary in habeas proceedings on extradition is extremely limited. 'Once the Governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order, (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition, and (d) whether the petitioner is a fugitive.' (Michigan v. Doran 439 U. S. 282 at p.

289.)" (In re Fabricant, 118 Cal.App.3d 115, 119-120.) "The courts in a Habeas Corpus proceeding of this kind, where the prisoner is arrested for extradition, cannot go into a trial of the merits of the cause. The proceeding is only an initiatory step to a trial in another State. As to the guilt of the prisoner, they are not allowed to inquire. Their judicial powers are limited to a determination on the sufficiency of the papers and the identity of the prisoner." (In re Kimler, 37 Cal.2d 568, 571 quoting Kurtz v. Florida, 22 Fla. 36, 45.)

Whether an alleged fugitive is substantially charged with a crime is a question of law, which is always open, upon the face of the papers, to judicial inquiry, on an application for discharge under a writ of habeas corpus. (Roberts v. Reilly, 116 U.S. 80, 95.) "Any other judicial inquiry in the asylum state into the matter exceeds the

court's jurisdiction. [Citations.]" (In re Fabricant, supra, 118 Cal.App.3d 115, 120.)

Real parties attack the sufficiency of the affidavit on several grounds. First, citing Ex parte Spears, 88 Cal. 640, they argue that the affidavit is insufficient because Judy stated merely that she believed that Richard and Gerard had committed the kidnap rather than stating that she knew they had. In Ex parte Spears, supra, the petitioner had been arrested in California by virtue of a warrant issued by the Governor in compliance with a requisition from the Governor of Alabama. Petitioner applied to the court for a discharge from imprisonment on a writ of habeas corpus. The affidavit accompanying Alabama's requisition stated that the affiant "has reason to believe and does believe" that Spears (the petitioner) had embezzled a carload of mules. The court

granted petitioner's application for discharge on the ground that the affidavit was insufficient to support an issuance of a warrant. It held: "[A] mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant." (Id. at p. 642.)

Unfortunately for real parties, under Louisiana law the language of the affidavit used in describing the charge of simple kidnap cannot be characterized as "insufficient" for purposes of the inquiry here. Louisiana Code of Criminal Procedure, article 465 provides:

"A. The following forms of charging offenses may be used, but any other forms authorized by this title may also be used.

". . . . . .

"30. Simple Kidnapping -- A.B. Kidnapped C. D."

In other words, under Louisiana law, it is enough, in terms of sufficient pleading of this criminal offense, simply to say "A.B. kidnapped C.D." Judy's affidavit contains such a statement. Thus Spears is distinguishable on the sufficiency of the affidavit and therefore not controlling.

Real parties next argue that under Louisiana law[1/] a parent cannot be substantially charged with kidnap of his or her child if he or she has custody of the child. Relying upon Application of Varona,

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1. The pertinent Louisiana statute provides: "Simple Kidnap is:

"(4) The intentional taking, enticing or decoying away and removing from the state, by any parent, of his or her child, from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state, without the consent of the legal custodian, with intent to defeat the jurisdiction of the said court over the custody of the child."

232 P.2d 923, they contend that the warrant was properly [sic] granted because Richard had custody of the children which means that a necessary element of the crime is absent from the face of the documents. They reach this conclusion by positing that if Judy had informed the authorities in her affidavit that Richard had a competing custody order for the children from California, the absence of the necessary element would have been obvious. Such is not the case.

In Application of Varona, supra, 232 P.2d.923, Pedro Varona was charged in Stockton, California, with the crime of feloniously taking money from a partnership of which he was a member. The California Governor sought the extradition of Varona from the State of Washington. The Washington court found that he was not substantially charged with a crime, because, according to California law, a partner could not be guilty

of theft of the funds of a partnership of which he was a member.

The charging document on its face stated that Varona stole money from a partnership of which he was a member. Thus, on its face, in view of substantive California law, it was an insufficient characterization of the purported criminal charge.

The only case cited by real parties to support their position that under Louisiana law a parent cannot be guilty of kidnapping his or her child if he or she has a custody order is State v. Elliott (1931) 171 La. 306, 131 So. 28, 77 ALR 314. Elliott is not controlling in the present situation, however, because it concerned a situation wherein a father took a child from its mother shortly after they parted. At the time no separation or divorce proceeding had been filed by either, and no order of court had

been rendered awarding custody of the child to either spouse. (Id., at p. 29.)

Richard's claim that he has superior rights to the custody of the children by way of his California custody order is simply a defense to the charged crime. As such he will have to present it to the Louisiana courts for a determination of the validity of his position. The fact that he has such a defense does not invalidate the charging papers.

Although we abhor Judy's apparent willingness to take advantage of our federal system to further this custody battle, and are sympathetic to real parties' position, we must conclude that their arguments are irrelevant to the only issue a court in the asylum state may properly address: are the documents on their face in order. Real parties' insistence that they have committed

no crime will have to be demonstrated in Louisiana. They have not shown here that the extradition documents on their face are improper, and neither we nor the court below is authorized to consider the merits of their defenses.

The assertion made by real parties here that they are not substantially charged with a crime because they are innocent is similar to the one considered in Drew v. Thaw, 235 U.S. 432, wherein Justice Holmes noted: "But this is not Thaw's trial. In extradition proceedings, even when, as here, a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. . . . There is no discretion allowed, no inquiry into motives. [Citations.] The technical sufficiency of the indictment is not open. [Citations.]

And even if it be true that the argument stated offers a nice question, it is a question as to the law of the [demanding state] which the [demanding state] must decide." (Id. at pp. 439-440.)

We remain curious as to why Governor Deukmejian's office has apparently declined to inform the Louisiana authorities about the latest California award of custody in a proceeding in which Judy personally participated. If there has been such transmission of information, our perplexity yet remains over what good purpose would be served in pursuing this matter as a criminal case. Certainly real parties acted rashly, but to put them through a criminal trial when, on all the facts, it seems apparent that no crime has been committed suggests to us a perversion of the federal system.

Nevertheless, having faithfully applied the law here applicable as we see it,

we can only trust that the courts of Louisiana will do the same when all the facts are there revealed.

DISPOSITION

The petition is granted and the court is directed to set aside and vacate its orders of August 24 and August 30, 1984, in case no. SCV-224030, and to enter new and different orders denying the petitions of Richard Smolin and Gerard Smolin for writs of habeas corpus.

/s/ McDaniel
J.

I concur:

/s/ Kaufman
J.

I concur in the result and in most of the court's opinion. However, I do not agree with the personal views expressed by the majority.

MORRIS

P.J.

A P P E N D I X "C"

SUPERIOR COURT OF THE

STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

DEPARTMENT NO. 1

HON. WILLIAM PITT HYDE, JUDGE

In re GERALD J. SMOLIN and RICHARD SMOLIN on Habeas Corpus,	)	SCV-224030
Petitioners.	)	E001358

REPORTER'S TRANSCRIPT OF

ORAL PROCEEDINGS

Friday, August 24, 1984

* * *

THE COURT: Well, I would only -- I will take judicial notice of the California family law file, and, as part and parcel of that, I would note that the Court in the consideration of that case indicated at the conclusion of that hearing that:

"The Court would further find that his attempts--" referring to Mr. Pope excuse

me, referring to Mr. Richard Smolin, "That his attempts at this --" to exercise visitation, "were frustrated by direct and deliberate acts on the part of Mrs. Pope, and those acts were taken with full acquiescence at least, and perhaps under the direction or dominance exercised over her by Mr. Pope.

"I don't think it is any secret in an evaluation of the testimony of the witnesses in this case that Mr. Pope has exercised a dominant aura of influence in this family structure. He has exercised that aura of influence and domination over at least the children and probably to some extent over Mrs. Pope.

"The history of the transfers to Oregon, to Texas, to Louisiana all would indicate that his role was not one of a husband acquiescing in the expressed or dominant desires of the wife, but were probably at least in concert with hers. And

that he has little if any regard for Mr. Smolin; he has little if any regard for the right of Mr. Smolin to exercise parental guidance and control and sharing and control and custody of his children. And he was an active participant in what the Court has concluded and does conclude was a deliberate and longstanding effort to deprive him of his parental rights.

"Mrs. Pope, from the standpoint of evaluation of witnesses and credibility and testimony, appeared to the Court to be an extremely bright and intelligent woman. She obviously would have to be. She could not maintain the lifestyle and degree of personal development that she has had if she did not have that innate intelligence. So she cannot plead ignorance.

"And the Court had great difficulty in accepting her testimony that when these children would make inquiry, 'Why doesn't dad

call us? Why doesn't dad write us?' that her only response was, 'I don't know.' No one of any limited degree of intelligence could fail to recognize that in those questions to her by the children, there was an inherent plea on the part of the children to let us have contact with dad, let us -- let us establish a relationship.

"And yet she failed to do that. She failed to do if for whatever reasons she had, either vindictiveness against Mr. Smolin or fear that he would somehow achieve a right of relationship which would deprive her somehow of her -- her custody and control of these children.

"The adoption process in Louisiana I can only describe as being verging on the fraudulent. There is -- to go to the agencies and represent that the father has failed to support and failed to communicate would indicate to some government agency

handling a case on the routine that they do, probably that phrased that way, it meant that dad had no interest in supporting and dad had no interest in establishing communications. And yet the history of this case shows that interest was always there."

The Court would conclude that the findings in the family law case adequately demonstrate that, in fact, the process initiated by Mrs. Pope in Louisiana and her declarations and affidavits were totally insufficient to establish any basis for rights of either herself personally or for the State, in an interest of the State of Louisiana.

The Court would grant the writ of habeas corpus and order the discharge of Mr. Gerard Smolin and Richard Smolin.

(The proceedings were concluded at this time.)

A P P E N D I X "D"

SUPREME COURT
FILED
JUN 5, 1986
LAURENCE P. GILL, CLERK

ORDER DUE
JUNE 30, 1986

ORDER DENYING REHEARING

LA No. 32068

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

PEOPLE
Petitioner

v.

SAN BERNARDINO SUPERIOR COURT,
Respondent
RICHARD SMOLIN, ET AL.
REAL PARTIES IN INTEREST

_____Petition

for rehearing DENIED.

Lucas, J. and Panelli, J.,

are of the opinion the petition should

be granted.

[s] Bird
Chief Justice

A P P E N D I X "E"

APPENDIX E

California Penal Code section 1548.2:

> No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime

> under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand.

(See section 3 of the Uniform Criminal Extradition Act, 11 Uniform Laws Annotated.)

California Penal Code section 1550.1:

> No person arrested upon such warrant shall be delivered over to the agent of the executive authority demanding him unless he is first taken forthwith before a magistrate, who shall inform him of the demand made for his surrender, and of the crime with which he is charged, and that he has the right to demand and procure counsel. If the accused or his counsel desires to test the legality of the arrest, t magistrate shall remand the accused to custody, and fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. If the writ is denied, and probable cause appears for an application for a writ of habeas corpus to another court, or justice or judge thereof, the order denying the writ shall remand the accused to custody, and fix a reasonable time within which the accused may again apply for a writ of habeas corpus. When an application is made for a writ of habeas corpus as contemplated by this section, a copy of the application shall be served as provided in Section 1475, upon the district attorney of

the county in which the accused is in custody, and upon the agent of the demanding state. A warrant issued in accordance with the provisions of Section 1549.2 shall be presumed to be valid, and unless a court finds that the person is not the same person named in the warrant, or that the person is not a fugitive from justice, or otherwise subject to extradition under Section 1549.1, or that there is no criminal charge or criminal proceeding pending against the person in the demanding state, or that the documents are not on their face in order, the person named in the warrant shall be held in custody at all times, and shall not be eligible for release on bail.

(See section 10 of the Uniform Criminal Extradition Act, 11 Uniform Laws Annotated.)

California Penal Code section 1553.2:

> The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided has been presented to the Governor, except as such inquiry may be involved in identifying the person held as the person charged with the crime.

(See section 20 of the Uniform Criminal Extradition Act, 11 Uniform Laws Annotated.)

DECLARATION OF SERVICE BY MAIL

Case Name: People of the State of California v. Superior Court of the State of California, for the County of San Bernardino (Richard Smolin and Gerard Smolin, Real Parties in Interest.)

Court No. 86-

(Service Pursuant to United States Supreme Court, Rule 28(5)(c)

I declare that I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 "K" Street, Suite 511, P.O. Box 944255, Sacramento, California 94244-2550.

On August 29, 1986, I served the attached PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

Laurence P. Gill, Clerk
California Supreme Court
360 McAllister Street, Room 4050
San Francisco, California 94102

Dennis P. Riordan
Attorney at Law
523 Octavia Street
San Francisco, California 94102

Declaration of Service by Mail
(continued)

Chuck Nacsin, Esq.
357 W. Second St., Ste. 7
San Bernardino, California 92401

Dennis Kottmeier
District Attorney
San Bernardino County
316 North Mt. View Avenue
San Bernardino, California 92415
Attn: JOSEPH A. BURNS,
Deputy District Attorney

Office of the Clerk
California Court of Appeal
Fourth Appellate District
Division Two
303 W. Third Street, Rm. 640
San Bernardino, California 92401

Hon. David L. Baker, Clerk
County of San Bernardino
351 N. Arrowhead Ave., 2nd Floor
San Bernardino, CA 92415-0210

I declare under penalty of perjury that all parties required to be served have been served, and the foregoing is true and correct and that this declaration was executed at Sacramento, California, on August 29, 1986.

_____
(Signature)